STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RAGHEED AKRAWI,

Defendant-Appellee.

UNPUBLISHED
December 9, 2003

No. 241925
Oakland Circuit Court
LC No. 91-106877-FC

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

The jury convicted defendant of conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MCL 750.157a. The trial court sentenced defendant to a term of life imprisonment without the possibility of parole. Defendant exhausted his appeals and his conviction and sentence were affirmed. Thereafter, defendant moved for relief from judgment in the trial court because he claimed that the prosecutor withheld the fact that a prosecution witness, Wissam Abood, received a favorable plea arrangement in exchange for his testimony. After an evidentiary hearing, the trial court erroneously granted defendant's motion and ordered a new trial. The prosecution appeals by leave granted, and we reverse.

I. Standard of Review

The prosecutor contends that the trial court abused its discretion when it granted defendant's motion for relief from judgment. We agree.

This Court reviews a trial court's grant of a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 244 NW2d 500 (2001). An abuse of discretion occurs when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *People v Jackson*, 467 Mich 272, 277; 650 NW2d 665 (2002). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). This Court will only find clear error if it is "left with a definite and firm conviction that a mistake was made." *People v Lester*, 251 Mich App 58, 67; 649 NW2d 792 (2002).

A trial court may not grant a motion for relief from judgment if the defendant could have raised the issue on direct appeal unless the defendant shows good cause for the failure and the issue caused actual prejudice. MCR 6.508(D)(3). Actual prejudice means that but for the error,

there was a reasonable likelihood of a different outcome at trial or that the irregularity was so offensive to justice that the conviction should not be allowed to stand. MCR 6.508(D)(3)(b)(i); *People v Jackson*, 465 Mich 390, 397-398; 633 NW2d 825 (2001), mod 465 Mich 1209 (2001). The federal due process cases on which defendant relies also require a showing of actual prejudice - an error that would have changed the outcome of the trial. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972).

II. Analysis

Defendant did not show good cause for failing to raise this issue on direct appeal. Defendant did not file his brief on appeal in *People v Akrawi*[1] until November of 1993. Abood's pleas were entered in April of 1992, which gave defendant enough time to discover and include this issue in his direct appeal.

Furthermore, it was clear error for the trial court to find that the prosecutor withheld evidence favorable to defendant. Though it is true that the prosecutor must disclose to the jury when a witness has been granted immunity or leniency in exchange for his testimony, it is equally true that the prosecution is not required to disclose future possibilities of leniency for the jury's speculation. *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976); *People v Dowdy*, 211 Mich App 562, 570-571; 536 NW2d 794 (1995). The making of plea arrangements is an executive function within the authority of the prosecutor. Indeed, no plea arrangement is binding unless the prosecutor has approved it or unless the prosecutor has assigned the authority to make the arrangement to the police. *People v Gallego*, 430 Mich 443, 452, 454; 424 NW2d 470 (1988).

We find *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998), instructive. In *Lester*, the witness did not sign a plea agreement until after the defendant's trial. *Id.* at 266. The fact that the arresting police officers did not charge the witness with certain offenses was merely an assumption by the police regarding the conduct of the prosecutor and did not indicate that a deal had been made earlier. *Id.* at 269, 272. Here, Abood did not sign his plea agreement until March 17, 1992. The earliest acknowledgment that the Macomb County Prosecutor had approved of the arrangement was the letter sent to Lawrence Bunting in the Oakland County Prosecutor's Office from Sheldon Halpern, Abood's trial attorney, in February of 1992. The letter asked Bunting to send information regarding Abood's cooperation because the prosecutor in Abood's case had consented to reduce the charges. Although Abood discussed his cooperation with law enforcement before that time, this did not create a valid plea agreement because law enforcement has no such authority. It is clear that the Macomb County Prosecutor did not reach a deal with Abood until after defendant's trial in October of 1991. All earlier communications with law enforcement relate only to a future possibility of leniency. Therefore, it was clearly erroneous for the trial court to find that Abood must have had a deal before defendant's trial based solely on the testimony of Halpern and correspondence sent by him.

[1] Unpublished opinion per curiam of the Court of Appeals, issued October 24, 1995 (Docket No. 147344).

Equally important and dispositive, defendant failed to show actual prejudice to his case from the prosecutor's alleged failure to disclose a possible deal with Abood. Abood was not the most significant witness testifying against defendant at trial. While Abood testified that defendant sold him relatively small amounts of cocaine, another witness, Rene Arias testified that he sold numerous kilograms of cocaine to defendant and his co-conspirators. Arias testified that at one point defendant owed $800,000 for cocaine, that defendant paid this amount, and asked to buy more kilograms of cocaine. Defendant attempted to impeach Arias with information about the consideration Arias received in exchange for his testimony to no apparent avail.

Moreover, and significantly, other witnesses testified about Abood's relationship with the Macomb County Prosecutor's Office, and the jury was apprised of the potential for future leniency in exchange for his testimony. Police Officer Charles Pappas, who worked with the DEA in 1990-1991, testified that Abood's bonds had been reduced to allow him to leave jail to testify and further assist in the investigation. Also, former Assistant Prosecutor Trish Fresard testified that she was to report Abood's cooperation to Macomb County Prosecutor Carl Marlinga. Further, Assistant Prosecutor Mike Suhy testified that he had discussed the possibility of reducing the charges against Abood prior to defendant's trial. And, of course, having heard this testimony, the jury clearly understood that Abood was in close communication with the prosecutor's office and that there existed the potential for a deal. Again, however, Abood did not actually enter his plea until March 17, 1992, months after defendant's trial in October of 1991.

When we consider all the foregoing circumstances and testimony, further disclosure of a possible deal would not have resulted in a different outcome at trial. As discussed, evidence was presented to the jury that Abood would potentially receive consideration for his testimony, and Abood was not the most significant witness testifying against defendant. The introduction of more details of Abood's future deal with the Macomb County Prosecutor would not have changed the outcome of defendant's trial. Furthermore, the prosecution was not required to introduce such evidence because Abood's plea was not entered until March 17, 1992, after defendant's trial in October of 1991.

For the foregoing reasons, defendant could have raised this issue on direct appeal, he failed to show good cause for his failure to do so, and he did not suffer actual prejudice. Therefore, defendant is not entitled to relief from judgment.

Reversed.

/s/ Donald S. Owens
/s/ Henry William Saad

I concur in result only.

/s/ E. Thomas Fitzgerald